IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1405

WINTHROP DRAKE THIES,

Appellant,

—v.—

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

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Appellee Has Not Overcome Appellant's Constitutional Contentions

The appellee's motion acknowledges, as it must, and as the appellant contends, that an attorney may not be disciplined "in an arbitrary or discriminatory manner" or "in a way which infringes upon constitutional rights" (pp. 7-8). It admits also that the means taken by the legislature toward a legitimate end must be "reasonable and appropriate to that end" (p. 8). But it nowhere shows that an automatic, hearingless disbarment for conduct, grave or, as here, trivial, which may fall within the loose concept

of a Federal "felony" survives these admitted tests. In fact, the motion does not address itself at all to the denial to the appellant of a hearing; the term "hearing" is not once mentioned, a conspicuous omission since our basic complaint against Judiciary Law, § 90(4), is that it provides no hearing.

The interpretation below of § 90(4), appellant has shown, clearly violates constitutional requirements. It also sharply contrasts with the Federal disciplinary cases which, on constitutional grounds, expressly prescribe a hearing even where, for a Federal offense or a state disbarment, court rules specifically mandate an automatic, hearingless disbarment. *Matter of Jones,* 506 F.2d 527, 529 (8th Cir., 1974), involving a Federal felony conviction, and other cases cited in the jurisdictional statement (hereafter "Jur. St."), p. 21.

None of the cases cited by the appellee for its assertion that the constitutionality of § 90(4) has been "repeatedly upheld" (p. 10) sustains its rejection of a hearing under the circumstances here, where the Federal felony was so trivial that it had no state counterpart. In *Matter of Abrams,* 38 App. Div.2d 334 (1st Dept., 1972), the court relied on a New York analogue. In *Matter of Mitchell,* 40 N.Y.2d 153 (1976), the "single question" was whether disbarment was constitutional when the felony conviction remained subject to appellate review (at 155). In *Matter of Glucksman,* 57 App. Div.2d 205 (1st Dept., 1977), the felony conviction was of a state offense; the considerations particularly applicable to a state offense have already been noted (Jur. St., p. 27). No convictions at all, state or Federal, were involved in *Gerzof v. Gulotta,* 57 App. Div.2d 821 (1st Dept., 1977), app. den., 42 N.Y.2d 960 (1977), and the related *Mildner v. Gulotta,* 405 F.Supp. 182 (S.D.N.Y. 1975), aff'd, 425 U.S. 901 (1976). The passage quoted by appellee from *Gerzof* (p. 10) that

> "The Supreme Court has found that section 90 does not violate the Federal Constitution . . . ",

a proposition for which *Gerzof* cites *Mildner,* thus can have no relevance to § 90(4).

Mildner, in fact, vividly describes the extensive hearing procedure before a referee which is regularly utilized by the New York courts in enforcing § 90(2), which authorizes discipline for non-felony misconduct. The procedure is governed by § 90(6), and includes the attorney's right to be heard. Cf. *Goldsmith v. U.S. Board of Tax Appeals,* 270 U.S. 117, 123 (1926).

The appellee justifies the denial of a disciplinary hearing because the jury trial and appellate review in the criminal proceedings are stated to fulfill the due process requirements (p. 10). This ignores the purpose of the disciplinary hearing, which is not to relitigate guilt or innocence, but to afford an opportunity to present circumstances in mitigation of discipline (Jur. St., p. 20). Evidence of this character would often not even be admissible in a criminal trial, but would bear weightily on the extent of the discipline to be imposed. The criminal proceedings cannot supply the due process lacking in the disciplinary proceedings.

Granted that a legislature may enact a statutory discrimination "if any state of facts reasonably may be conceived to justify it" (appellee's brief, pp. 8-9, quoting *McGowan v. Maryland,* 366 U.S. 420, 425-26 [1961]), the appellee nevertheless ignores several factors bearing on the issue of reasonableness here.

First, appellant's challenge to reasonableness was primarily addressed to the recent judicial interpretation of § 90(4). *Matter of Donegan,* 282 N.Y. 285 (1940), had interpreted § 90(4) to be inapplicable to a Federal felony disciplinary proceeding where there was no state felony analogue, an interpretation the legislature has never seen fit to alter. It is the abandonment of *Donegan* by *Matter of Chu,* 42 N.Y.2d 490 (1972), and the application of *Chu* to the inconsequential offense here that render § 90(4) unreasonable and constitutionally intolerable.

The appellee correspondingly ignores the unreasonableness in the catch-all description of a wide variety of Federal offenses as "felonies." The majority in *Chu* and the majority below imported this irrationality into § 90(4), disregarding the actual conduct to which the pejorative is affixed (see Jur. St., pp. 14-15, 18-19, 25-29).

Equally invalid is the appellee's dismissal of appellant's *ex post facto* contention. Tidy compartmentalization of attorney discipline into an exclusively "civil" or exclusively "criminal" pigeonhole is no more useful analytically than compartmentalizing the practice of law into a "right" or "privilege". *Schware v. Board of Bar Examiners,* 353 U.S. 232, 239, n. 5 (1957). Sufficient punitive consequences attach to disbarment to require the invocation of the *ex post facto* prohibition, which, contrary to the appellee's view (p. 6), is not of exclusively criminal application (Jur. St., pp. 29-30 and n. 32). *Donegan,* in fact, based its ruling on the "[s]trict construction" of "felony" in the predecessor to § 90(4) (282 N.Y. at 292, quoted by appellee at p. 5), a canon of construction not applicable to purely civil statutes. *Ex post facto* is not diminished by the fact that it results from a retrospectively applied judicial interpretation of a statute rather than from a retrospectively

applied statute. *Bouie v. City of Columbia,* 378 U.S. 347, 353-4 (1964). It applies here in full vigor.

As to recent certiorari petitions seeking review of disbarment judgments, whose denials are cited by the appellee (pp. 10-11), the suggestion is ventured that significant contentions advanced by appellant, particularly addressed to the absence of an administrative burden in cases of this character, the chaotic state of the present Federal criminal statutes, and the utter absence of moral culpability here (Jur. St., pp. 22-24; pp. 14-15, 25-29; 15, 25), have not previously been advanced to the Court. These, coupled with appellant's remaining contentions, it is earnestly urged, warrant review.

CONCLUSION

The Court should note probable jurisdiction, and should reverse the judgment below.

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Respectfully submitted,

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